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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

JUL 25 1991

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of  
  
Amendment of the Commission's  
Policies on Preferences in  
Comparative Broadcast Hearings

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RM-7741

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FILE

**COMMENTS IN SUPPORT OF  
PETITION FOR RULE MAKING**

The National Association of Broadcasters  
("NAB")<sup>1/</sup> hereby submits these Comments in support of a  
Petition for Rule Making ("Petition") filed May 16, 1991, by  
Larry G. Fuss d/b/a Contemporary Communications, Radix  
Broadcasting, Inc., Howard N. Binkow and Dale A. Ganske  
("Petitioners").<sup>2/</sup> The Petition calls on the Commission  
"to establish a preference benefitting petitioners who  
assume the risk and expense of locating an available channel  
for a new FM allotment and successfully pursuing that  
allotment through the Commission's rule making process and  
who become applicants for the new channel allotted."<sup>3/</sup>

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<sup>1/</sup> NAB is a nonprofit, incorporated association of radio and television broadcast stations and networks. NAB serves and represents America's radio and television stations and all the major networks.

<sup>2/</sup> The Petition was placed on Public Notice (Report No. 1850) on June 24, 1991.

<sup>3/</sup> Petition at 1. Although the Petition specifically addresses FM allotments, we believe that the principles  
(continued...)

NAB believes that such an "entrepreneur's preference" would further the public interest by encouraging parties to seek out new frequency allotments. A positive response to the Petition would also add a needed element of equity to the comparative hearing process. It also would be consistent with the Commission's recent efforts to curb abuses in that process,<sup>4/</sup> in that those with a legitimate purpose would be encouraged to go forward with proposals seeking new or upgraded facilities. NAB, therefore, urges the Commission to move quickly in initiating the rule making sought by Petitioners, and supports the concept of an entrepreneur's preference embodied in the Petition.

NAB agrees with Petitioners that there is little incentive for an entrepreneur to seek out frequencies that might be available in rural or underserved areas,<sup>5/</sup> especially if the entrepreneur is an existing broadcaster. Once an entrepreneur has expended considerable effort and money in locating a vacant frequency, the frequency is then opened for applications from all comers, who generally are

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<sup>3/</sup> (...continued)  
contained in the Petition should also be applied to television allotments.

<sup>4/</sup> Report and Order in Gen. Docket No. 90-263, 6 FCC Rcd 85 (1990), reconsideration granted in part, 6 FCC Rcd 2901 (1991).

<sup>5/</sup> Although this proposed policy will be used most often in allocations of frequencies in rural and underserved areas, it should be broad enough to apply to allocations of frequencies in large markets as well.

placed at least on equal footing with the entrepreneur. Indeed, oftentimes other applicants are on better footing than the broadcaster entrepreneur because they have the opportunity to structure their ownership/management characteristics in order to take advantage of pre-existing comparative preferences, i.e., minority ownership and/or diversification of ownership. The existing broadcaster, on the other hand, likely does not have the same latitude in structuring itself for the sole purpose of winning a comparative hearing.

Many potential entrepreneurs are AM owners who are trying to start up new FM stations in their respective markets. While these entrepreneurs are given an opportunity and initiative to seek out an available FM frequency, their efforts may well be thwarted in the comparative hearing process by other applicants who may take full advantage of the entrepreneur's earlier efforts. Thus, parties who sit back and do nothing during the table-amendment stage may harvest the fruits of the entrepreneur's labor.

The cost involved in searching for an open frequency should not be underestimated. The entrepreneur usually must pay a law firm and a consulting engineer to resolve the legal and technical issues, respectively. In addition, the entrepreneur might find that to arrange for an opening, existing stations may have to be moved. The cost

of that move would be compensated by the entrepreneur, as well.<sup>6/</sup>

NAB believes that the rule making sought by Petitioners would pave the way for the Commission to give credit to the party who invests "sweat equity" in finding vacant frequencies. Establishment of the preference would also further efficient use of the FM spectrum by encouraging entrepreneurs to seek out unused frequencies.<sup>7/</sup>

Moreover, an entrepreneur's preference would be consistent with recent Commission efforts to curb abuses in the licensing process. By accruing only to the party who discovered the vacant frequency, the preference would aid only those applicants who were truly interested in operating the facility. Conversely, if the entrepreneur were to back out of the rulemaking proceedings pursuant to a settlement agreement, the entrepreneur could be reimbursed for its expenses incurred in locating the frequency, because such

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<sup>6/</sup> Beyond cost and time commitments, an entrepreneur who petitions for an amendment to the Table of Assignments promises to file an FCC Form 301 to apply for a construction permit. This promise is further assurance that the entrepreneur is committed to operating a station.

<sup>7/</sup> Entrepreneurs are often hindered in their efforts to find vacant frequencies because many silent FM stations continue to be listed in the table of assignments long after the station has ceased operation. In this regard, NAB believes that the Commission should help entrepreneurs by removing the listing from the table of assignments immediately after the license has been returned to the Commission. It also should improve its procedures for identifying silent stations and requiring showings regarding the likelihood of resumed broadcast operations.

expenses could be part of the legitimate and prudent expenses incurred by the entrepreneur.<sup>8/</sup> As further means of prompting entrepreneurs to seek unused frequencies, the Commission should also consider, for entrepreneurs who settle in a comparative hearing, reimbursement of earlier reasonable and prudent engineering and legal costs incurred in the table-amendment stage.<sup>9/</sup>

The proposed entrepreneur's preference is distinguishable from the recently adopted pioneer's preference policy,<sup>10/</sup> which NAB opposed,<sup>11/</sup> because the two preference schemes would operate differently. The pioneer's preference deals with spectrum allotment among untried, unproven services which may or may not ultimately serve the public interest, or which may less serve the public interest than an alternate use of the spectrum. The proposed entrepreneur's preference, on the other hand, would be a frequency assignment matter for FM and television broadcasting, publicly desired services with proven track

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<sup>8/</sup> See Report and Order, supra note 4.

<sup>9/</sup> Furthermore, an entrepreneur who is unable to settle because it has an obviously losing position should be able to petition the Commission to have the ultimately successful applicant reimburse the entrepreneur for its reasonable and prudent table-amendment costs.

<sup>10/</sup> Report and Order in Gen. Docket No. 90-217, FCC 91-112, adopted April 9, 1991, released May 13, 1991, summarized at 56 Fed. Reg. 24,011 (May 28, 1991).

<sup>11/</sup> See, e.g., Comments of NAB in Gen. Docket No. 90-217, filed June 29, 1990; NAB Petition for Reconsideration in Gen. Docket No. 90-217, filed June 28, 1991.

records for meeting the needs of local communities. In addition, and in stark contrast to the pioneer's preference, the proposed entrepreneur's preference would give Commission staff and applicants alike clear guidance as to whom it would be granted -- the preference accrues to the party locating the vacant channel, and no one else. Thus, little additional administrative burden is created for the Commission.

There is also sound legal basis for implementing the concepts advanced in the Petition. The proposed entrepreneur's preference is similar to both the minority preference scheme, which has been upheld by the Supreme Court,<sup>12/</sup> and the AM daytimer's preference, which has been upheld by the U.S. Court of Appeals for the Second Circuit,<sup>13/</sup> in that all of these preferences are among several factors which would be considered in comparative hearings. The non-dispositive nature of the proposed entrepreneur's preference adds to its merit.

#### CONCLUSION

The preference sought by the Petition would further more efficient use of the spectrum and Commission

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<sup>12/</sup> Metro Broadcasting v. FCC, 497 U.S. \_\_\_\_, 110 S.Ct. 2997 (1990).

<sup>13/</sup> National Black Media Coalition v. FCC, 822 F.2d 277 (2nd Cir. 1987). The Commission allowed a preference to be given to an existing broadcaster when it recognized the "sweat equity" invested by an AM daytimer. NAB intervened in the Coalition's appeal and filed a brief in support of the daytimer's preference.

resources, and would thus serve the public interest. NAB, therefore, urges the Commission to initiate the rule making requested by the Petition.

Respectfully submitted,

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July 25, 1991

**CERTIFICATE OF SERVICE**

I, Judith Gerber, do hereby certify that a true and correct copy of the foregoing "Comments in Support of Petition for Rule Making" was sent via United States First Class mail, postage prepaid, on this the 25th day of July 1991 to each of the following:

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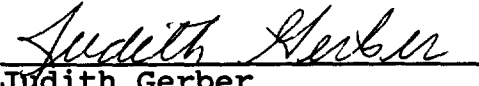
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